Supreme Court, U.S.
FILED
AUG 21 1995
OFFICE OF THE CLERK

No. 95-289

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DEBORAH WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

When Dr. Deborah Williams was a resident in pathology, she got a "moonlighting" job in a Medicaid clinic in the Bronx. There is no question that people there were engaged in loathsome conduct, and, as a result, the Medicaid program was defrauded. The issue at trial was whether Dr. Williams knew what her co-workers were doing and intentionally participated in their enterprise: though she worked with the confessed participants for months, not one claimed to have ever discussed fraudulent conduct with her, and not one claimed to believe that she knew of the fraud. Indeed, they all admitted that they engaged in conduct designed to hide their fraud from her. The only witness who assigned conduct to Dr. Williams that

was inconsistent with innocence was a crack addict who, it was shown after trial, lied about the very circumstances that she claimed enabled her to recall their encounter several years earlier.

In the Government's view none of this mattered: Dr. Williams was guilty because as a "medical practitioner" she "should have known" that "no real medical treatment was being given" at the clinic and if she did not actually know that, she must have "consciously avoided" knowing. As for the crack addict, the Government took the position that evidence of a witness's perjury discovered after trial may be considered only in the context of a new trial motion and may not be considered by an appellate court evaluating the sufficiency of the evidence.

Six questions are presented by this case, the first five of which are also raised by the petition of co-defendant, Dr. Gilbert Ross. The questions are:

The questions presented are:

1. whether a conviction premised on conscious avoidance is consistent with the Constitutional requirement that all elements of a crime, including knowledge, be proven beyond a reasonable doubt;

2. whether, if a conscious avoidance instruction is ever permissible, a jury instruction that lacks the "balancing language" deemed crucial to prevent conviction based on an objective ("should have known") standard case is an error going "to the very essence of the case";

3. whether, as some Circuits have required, there must be <u>evidence</u> of a

defendants "conscious purpose" to avoid knowledge and whether the evidence warranted a conscious avoidance instruction here;

4. whether the conviction here, based on arguments and evidence of what others "knew or should have known", is consistent with the high standard of proof beyond a reasonable doubt;

5. whether the standard of review by the Court of Appeals was consistent with Jackson v. Virginia, 443 U.S. 307 (1979).

6. whether the court erred when it refused to either (a) consider evidence that a critical Government witness committed perjury, or (b) remand to develop evidence on the perjury claim, and, instead, factored the witness's testimony into its analysis when finding

the evidence sufficient.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Defendants-Appellants Mohammed Sohail Khan, Jaqueline Otero, Deborah Williams, Rosaly Saba Khalil, Lancaster Lo and Gilbert Ross, and Appellee United States of America.

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OPINION BELOW

The opinion of the Second Circuit is reported at 53 F.3d 507 (2d Cir. 1995).

JURISDICTION

The Second Circuit's opinion was issued on April 21, 1995. A timely petition for rehearing was denied on June

9, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the Constitution provides in pertinent part:

...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ... nor be deprived of life, liberty or property, without due process of law...

STATEMENT OF THE CASE

Dr. Williams was charged with RICO, mail fraud and money laundering violations stemming from her employment at a walk-in medical clinic run by Mohammed Sohail Khan. The patients at the clinic, principally down-and-out drug and alcohol abusers, were all participants in New York State's Medicaid program.

The indictment charged (and the evidence showed) that those involved in the day-to-day activities at the clinic were engaged in a fraudulent "blood for pills" scheme with many of the patients: the patients went to the clinic not for the purpose of obtaining medical care (which they often needed), but to obtain prescriptions for certain non-controlled drugs for which there was a black market; after having the prescriptions filled at a pharmacy, the patients would sell the drugs on the street. In return for the prescriptions, the patients underwent a number of unnecessary tests and procedures that were separately billed to Medicaid, and gave blood which was sent to a laboratory for comprehensive testing; the laboratory billed Medicaid and paid Khan a

percentage of its receipts.

Dr. Williams became involved with the clinic in 1990 when she was a second-year resident in pathology at Columbia Presbyterian Hospital. Responding to an ad Khan had placed in the newspaper, she learned from Khan that the patients were actually examined by licensed physician's assistants ("PAs"), and that physicians were needed to supervise the PAs and to review the patient charts prepared by them; since all of the patients at the clinic were Medicaid recipients, moreover, Khan advised that Dr. Williams needed to be enrolled in Medicaid as a provider in order to work there.

At the time, Dr. Williams was not enrolled, and had had no experience with

the program.[1] However, she eventually enrolled as a provider and began to work at one of Khan's clinics, reviewing the work of PAs during the week, and seeing patients herself on Saturdays.

Dr. Williams stepped into a swamp. The clinic was staffed with shameless people like witnesses Carmen Guzman, the office manager at two of the clinics, and PAs Melville Ferns and James Rich. These cooperating witnesses were aware that many patients were not coming for medical care

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[1]In fact, Dr. Williams had almost no experience as a primary care provider, and no prior job experience outside of her academic training. After college, she went to graduate school at N.Y.U. and obtained a Master's degree in biochemistry. She then went to Downstate Medical School, and, after graduating in 1983, returned to N.Y.U. to pursue a doctorate from the Department of Medical and Molecular Parasitology for her study of pneumocystis carinii (an AIDS-related infection). She returned to medicine and did a surgical internship at Tulane University, and then went to Columbia's residency program in pathology. It was in her second year of that program that she responded to Khan's ad.

but, rather, for prescriptions for drugs which they could sell, and confessed not only that they regularly provided patients with the kinds of prescriptions that were in demand on the black market while systematically sending their blood off for laboratory testing, but that they also routinely falsified both patients' charts and clinical test results so as to make them appear to support the dispensation of drugs that were prescribed.

While the Government proved this misconduct over and over again, the defining issue for Dr. Williams was whether she knew what her co-workers were doing and intentionally participated in their enterprise. Khan never told Dr. Williams that he had set up this and other clinics as part of a scheme to bilk

Medicaid, and not a single one of the other confessed participants with whom she worked claimed to have ever discussed fraudulent conduct with her. Indeed, they all admitted that they engaged in conduct designed to hide their fraud from her, and none claimed to believe that Dr. Williams knew what was going on. Moreover, when these witnesses described her conduct, it was entirely consistent with that of someone who knew nothing of their fraudulent activities.[2]

In the Government's view, however, this did not matter. Tarring all of the defendants with a broad brush, it took the position that, because signs of criminal

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[2]Indeed, in an apparent effort to hide the fraud from her, Khan instructed the staff that, when Dr. Williams spent the most time at the clinic -- from 9:00-4:00 every Saturday -- the clinic should be run differently from the way it was run when only the PAs were seeing patients.

activity were supposedly all over, no one could have worked with Khan and not have known what was going on. Since Dr. Williams "must have" or "should have" known" what was going on, she must be guilty.

Specifically, the Government pointed to the physical appearance of the clinics and the homogeneity of the patient population, the repetitive nature of the complaints reported, diagnoses made, tests performed, prescriptions given, and expensive blood tests ordered, and, finally, the amount of money paid by Medicaid for what it contended was relatively little work by the doctors. Based on the claim (but not any evidence) that other doctors deduced wrongdoing from these circumstances, it argued that Dr.

Williams must have done so as well.

To this end, it introduced the testimony of other doctors as to what they deduced from charts they reviewed. It also presented testimony of a so-called "expert" who proffered his opinion about how "any reasonable physician within five years of graduation or even earlier" would perceive the charts.

The jury was then given a "conscious avoidance" charge that bolstered, rather than clearly negated, the Government's improper contention that "should have known" was a proper basis for the imposition of criminal liability. Thus, the jury was instructed: "If you find beyond a reasonable doubt that a defendant was aware that there was a high probability that the representations

charged in the indictment were fraudulent, but deliberately and consciously avoided confirming this fact, then you may treat this deliberate avoidance of positive knowledge as the equivalent of knowledge."

The charge did not clarify what specific fact a defendant could be found to know through a finding of conscious avoidance that would satisfy the knowledge element of each of the charged crimes (there were no "representations charged in the indictment"); it failed to include any "actual belief" balancing language called for repeatedly by the Circuit Courts, see, e.g., United States v. Feroz, 848 F.2d 359 (2d Cir. 1988), as necessary to insure that criminal liability is not measured against an objective standard; and, while the jury was advised that "the necessary

knowledge cannot be established by showing that a defendant was careless, negligent or foolish," the jury was not informed that knowledge could not be established through "recklessness" or because any medical doctor "should have known" what was going on.

The Court of Appeals gave short shrift to the numerous challenges raised to the charge. Without even acknowledging the Government's improper "should have known theory" -- a theory expressly articulated by the prosecutor at trial in arguing for the admission of evidence about what other doctors believed or deduced -- the Court simply stated that the failure to include "actual belief" balancing language did not constitute plain error. It did not even address the

contention that the charge was unconstitutionally vague because it did not clarify what "fact" a defendant could be found to know through a finding that he or she was aware of a "high probability" of its existence.

Likewise, in analyzing the sufficiency of the evidence, the Second Circuit relied on "conscious avoidance" as a basis for upholding the verdicts, but engaged in only a superficial analysis of how the evidence could support a finding of conscious avoidance. The Court simply reviewed certain evidence, and upon noticing the existence of some evidence consistent with guilt, ended the inquiry, concluding that the evidence was enough to allow a reasonable juror to conclude beyond a reasonable doubt that Dr.

Williams knew of the fraud or "consciously avoided confirming its existence." The Court did not point to any evidence showing that Dr. Williams deliberately or purposely avoided knowledge, and ignored all the evidence that contradicted or shed light on the modicum of evidence it was able to muster.

In addition, in evaluating the sufficiency of the evidence, the Court of Appeals factored into its analysis the testimony of a crack addict witness even though substantial evidence discovered after trial (by Dr. Williams and the Government) showed not only that the witness lied about the very circumstances that she claimed enabled her to recall her encounter with Dr. Williams, but also that

the witness was thoroughly unreliable.[3]

Since no other witness had implicated Dr. Williams in misconduct, on appeal the Government hung on to this witness's testimony about her encounter with Dr. Williams when arguing that the evidence

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[3]The witness -- the only one of the hundreds of patients personally seen by Dr. Williams who testified -- was the only witness who described conduct by Dr. Williams that appeared inconsistent with her innocence. She testified that she went to the clinic, and, after telling the "girl at the window" her symptoms, spent 15-20 minutes with Dr. Williams. During this time she allegedly told Dr. Williams nothing and Dr. Williams did not examine her; she claimed that Dr. Williams (who supposedly was just writing something the whole time) simply directed her next door to give blood and gave her a prescription for various medications.

The witness was a crack addict with a criminal record who claimed that she went to various clinics around the city five days a week for a year and a half to obtain prescriptions for drugs she could sell. Since her overall credibility and her specific ability to remember her visit with Dr. Williams over two years earlier was obviously questionable, she was asked a series of questions designed to bolster the reliability of her recollection. She claimed that she needed money to pay her son's Boy Scouts fees that particular day and obtained the funds by through the "blood for pills" scam. The evidence discovered after trial shows that she testified falsely. Not only was her son never in the Boy Scouts, he was not even in her custody at the time.

was sufficient. Indeed, it characterized the testimony as "devastating," and insisted that, "standing alone," it was sufficient to support the conviction.

Unlike this Court's handling of the perjury allegation in Communist Party v. Subversive Activities Control Board, 351 U.S. 115 (1956), the Second Circuit rejected Dr. Williams' efforts to bring the perjury to the Court's attention, to cleanse the record of the perjured testimony before the Court determined whether the evidence was sufficient to convict, or even to develop a record on the perjury issue. Rather, it accepted the Government's position that a motion for a new trial was the only context in which the import of perjured testimony could be assessed. According to the

Court, in the absence of any evidence of actual knowledge by the prosecutor that the witness's testimony was false, the Court could properly include even perjured testimony when weighing whether the evidence as a whole was sufficient to convict a defendant.[4]

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[4]Copies of correspondence between appellate counsel and the prosecutor regarding the perjury had been attached as an addendum to Dr. Williams' brief. Months after all the briefs were filed, the Government moved to strike the addendum and all references to the post-trial discovery of perjury on the ground that it was based entirely on materials outside the record and never presented to the trial court. Its motion was granted.

Dr. Williams moved for reconsideration in light of the Government's ongoing investigation into the perjury; in addition, because of the Government's insistence that the proper forum for resolving any factual issues was the District Court, Dr. Williams moved for a limited remand to the District Court for the purpose of developing the facts in connection with the perjury claim.

The motion for reconsideration and for limited remand was still pending when the Government reported the results of its investigation. Dr. Williams moved to advise the Court of the fruits of the Government's investigation, and to suggest that a limited remand to develop the facts was no longer necessary since the perjury was so clear.

The Government opposed the effort to have the Court of Appeals consider any evidence of perjury

(continued...)

REASONS FOR GRANTING THE WRIT[5]

I. Given The Proliferation of "Conscious Avoidance" Cases, The Laxness with which the Concept is Applied, The Lack of Guidance By This Court, The Conflict In Circuits, And The Recognized Risk Of Unfair Convictions, The Court Should Grant *Certiorari* To Consider The Constitutionality of Conscious Avoidance Convictions *Vel Non*, And If Constitutional, The Evidentiary Showing Necessary To Invoke the Concept and Instructions Required To Prevent Convictions Premised On Negligence.

In a comprehensive law review article

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[4](...continued)
in connection with deciding sufficiency of the evidence on appeal. It insisted that the Government's report of its investigation could not substitute for a trial judge's factual findings and conclusions of law regarding the post-trial perjury claim. According to the Government, the trial judge must be the one to make these determinations in the context of a new trial motion.

The Court of Appeals denied Dr. Williams' motion for reconsideration and for embodied remand, and her motion to advise the Court of the fruits of the Government's investigation. Its opinion affirming the conviction was filed shortly thereafter.

[5]The first two reasons involving "conscious avoidance" and "reasonable doubt" are adopted almost verbatim from the related petition of co-defendant Dr. Gilbert Ross.

entitled The Ostrich Instruction: Deliberate Ignorance As A Criminal Mens Rea, 81 Jrnl.Crim.L. & Criminology 191 (1990), Professor Ira Robbins reviews the emerging law of "conscious avoidance" and concludes that the "deliberate ignorance" charge is incompatible with the Constitutional requirement (In re Winship, 397 U.S. 358, 364 (1970)) that the prosecution prove each element of a crime beyond a reasonable doubt. The author shows, in a work that should be reviewed in depth, that the conscious avoidance instruction as generally given--even with "balancing language" requiring a jury to focus on the "actual belief" of a defendant--permits convictions based in fact on recklessness or negligence in cases where, as here, the law requires

actual awareness of a fact. Professor Robbins also discusses "the additional danger of *imprecise* jury instructions allowing conviction for merely negligent behavior, thereby eliminating even the subjective aspect of knowledge". Id. at 195. (Here, as discussed, the instruction did not even identify the "fact" supposedly avoided, much less contained "balancing language").

This Court has given little consideration of or guidance about "conscious avoidance" though, as an increasingly-used prosecutorial tool, and one which has created a conflict in Circuits about what evidentiary showing is required to justify an instruction, it warrants guidance. Although this Court seemingly "signaled" that "deliberate

ignorance" might work as an alternative to actual knowledge in Spurr v. United States, 174 U.S. 728 (1899) (a case involving "willfully certifying a check with insufficient funds in the drawer's account"), it also indicated that an evidentiary showing is necessary (that the defendant "shut his eyes to the fact and purposefully refrained from inquiry or investigation for the purpose of avoiding knowledge"). And, it suggested caution: the Spurr Court *reversed* the conviction because of the trial judge's inadequate response to a jury request for clarification of the "willful" element, which had foreclosed the defense that the defendant had had an honest contrary belief in the sufficiency of the drawer's funds. 174 U.S. at 739.

This Court only fleetingly dealt with the issue again in Leary v. United States, 395 U.S. 6 (1969) (discussed in the footnote)[6] and Turner v. United States, 396 U.S. 398 (1970), when it cited the fact that the Model Penal Code did not require "actual knowledge" and confirmed that actual knowledge by heroin traffickers that the product is smuggled was not required if they "practice[d] a studied ignorance" of that fact. According to the Robbins article, these cases led to an increasing frequency of "conscious avoidance" charges in narcotics cases and then to other types of cases.

United States v. Jewell, 532 F.2d 697

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[6]In Leary, this Court held unconstitutional a presumption that marijuana smokers had knowledge--even using the Model Penal Code's definition that equated awareness of a high probability of the fact for knowledge ("unless he actually believes that [the fact] does not exist")--that their marijuana had been imported.

(en banc), cert. denied, 426 U.S. 951 (1976) is the first comprehensive discussion of the deliberate ignorance instruction, and the case from which later cases spring. Though the defendant argued there that, given the existence of some evidence circumstantially supporting actual knowledge, the jury must find actual knowledge or acquit, the Court instructed that the government could sustain its burden by proving that, if the defendant was not actually aware of the marijuana in the vehicle, his ignorance "was solely and entirely a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth", 532 F.2d at 700. The Ninth Circuit majority affirmed,

but noted that "the required state of mind differs from positive knowledge only so far as necessary to encompass a calculated effort to avoid the sanctions of the statute while violating its substance. 532 F.2d at 704.

Notably, now-Justice Kennedy, joined by three others, dissented, writing that the instruction was "unacceptable because true ignorance, no matter how unreasonable, cannot provide a basis for criminal liability when the statute requires knowledge". 532 F.2d at 707. Notwithstanding the cogent dissent, as explained by Professor Robbins, the Jewell instruction now is used with so much frequency that it has all but swallowed the prosecutor's need to prove knowledge beyond a reasonable doubt.

Courts have and did require, however, that--because a conscious purpose of knowing the truth was deemed to satisfy criminal liability requirements only when the defendant was "aware of the high probability" of the fact in dispute (such as the vehicle carried contraband)--there must be an instruction concerning subjective awareness. In United States v. Esquer-Gamez, 550 F.2d 1231 (9th Cir. 1977), the Court addressed what was then and thereafter to be deemed vital "balancing" language necessary to comport with the burden of proving knowledge beyond a reasonable doubt (language that the Second Circuit in this case excused only because, though the government had requested it, defendants' then-counsel had not requested it). The balancing language

requires the jury to determine whether the defendant had an "awareness of a high probability" of the fact the government claims he knows, permitting a conviction on such "awareness" "unless [the defendant] actually believes it does not exist." 550 F.2d at 1235.

We agree with the suggestions in the Robbins article that the Jewell/ Model Penal Code instruction does not comport with the Constitutional requirement of proof beyond a reasonable doubt in any case where, as here, knowledge is a requirement: the instruction does not comport with "philosophical []or legal concepts of knowledge", and permits convictions based on recklessness or negligence, without knowledge. This Court should grant the writ and hold that

"conscious avoidance" is not consistent with the Constitution and that prosecutors must prove actual knowledge when knowledge is an element of an offense.

The use of the instruction is particularly egregious here, since the Court did allow a conviction based on what others knew. This is shown by statements concerning what doctors "should have known" made during the proffer of a doctor witness, and the Court's reliance on the conditions of the clinic, which to the government (though not to any doctor or PA) signified "fraud". This Court should grant the writ not only to make clear that, if "conscious avoidance" charges are Constitutional, they cannot rest on objective indicia of "knowledge", but also to remedy the unfair use of the conscious

avoidance theory to convict an innocent woman and caring doctor who, even if she "should have known", was not shown "aware" even if others were, and nonetheless faces prison and the loss of her license and livelihood.

At a minimum, *certiorari* review will permit the Court to require that a conscious avoidance instruction is never valid unless it contains the "balancing language" focusing on a defendant's awareness. Because such language is vital to focus on a defendant's ignorance, we suggest that it cannot be deemed harmless error to omit it, and its omission is always "plain error". This Court should take this case and overrule the holdings of the many courts that have allowed deficient "conscious avoidance"

instructions to stand.

Indeed, as the Robbins article discusses (pp.227-231 "Risk of Conviction For Negligence"), the Courts of Appeal have themselves recognized the need for the "unless" and "actual belief" balancing language; indeed, our own Second Circuit termed a conviction had without such an instruction "suspect". United States v. Bright, 517 F.2d 584, 587 (2d Cir. 1975). One wonders how the same Circuit could have sanctioned the instruction here when it felt so strongly about the need for balancing language in a conscious avoidance instruction that in United States v. Ferroz, 848 F.2d 359 (2d Cir. 1988), it ordered that copies of its opinion holding that an acceptable conscious avoidance should contain the

balancing language should be issued to all United States Attorneys within the Circuit. Indeed, there are such serious risks in a conscious avoidance instruction that some courts (but not the Second Circuit) have agreed that an instruction should not be given (to "supplement" an instruction on knowledge) unless there is specific evidentiary support. Once again, Justice Kennedy (concurring in part and dissenting in part) aptly noted in United States v. Marietta-Bejarano, 552 F.2d 1323, 1326 (9th Cir. 1977), that a conscious avoidance instruction invites juries to avoid scienter and convict because of standards "analogous to negligence". He counseled:

> The Jewell instruction should not be given unless the evidence can sustain a finding beyond a reasonable doubt, that the

> defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of being arrested and charged.... The danger is that juries will avoid questions of scienter and convict under the standards analogous to negligence. Such convictions are wholly inconsistent with the statutory requirement of scienter.[7]

Though some courts do require evidence of a deliberate purpose to have a defense in case of an arrest before an instruction is deemed proper and evidence held sufficient (as discussed in the footnote),[8] the Second Circuit allows use

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[7]Courts do in fact use "should" language (as occurred in this case), specifically exacerbating the risk of conviction for negligence. Thus, in United States v Eaglin, 571 F.2d 1069, 1074 (9th Cir. 1977), cert. denied, 435 U.S. 906 (1978), the Court reviewed an instruction that the jury could convict if the defendant "intentionally avoid[ed] knowledge by closing his eyes to facts which should [emphasis added] prompt him to investigate". The "should" standard was, we suggest, the controlling factor in this case.

[8]At least the Fifth, Ninth, Tenth and Eleventh Circuits require an evidentiary showing. See (continued...)

of a conscious avoidance charge without specific evidence of a conscious purpose to avoid detection. This conflict in Circuits already prompted the dissent of two Justices of this Court from the denial of certiorari in a case arising in the Second Circuit raising this same issue three years ago, in which the defendant-petitioner and the government conceded that the conviction would not stand in Circuits other than the Second, itself agreeing on the need for certiorari review. See Tomala v. United States, 504

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[9](...continued)
United States v. de Francisco-Lopez, 939 F.2d 1405 (10th Cir. 1991); United States v. Sanchez-Robles, 927 F.2d 1070 (9th Cir. 1991); United States v. Aleman, 728 F.2d 492, 494 (11th Cir. 1984); United States v. Batencort, 592 F.2d 916, 918 (5th Cir. 1979). In addition, the First Circuit, in United States v. Picciandra, 788 F.2d 39, 46 (1st Cir.), cert. denied, 479 U.S. 847 (1986), suggested that the instruction should not be given unless "facts suggest a conscious course of deliberate ignorance".

U.S. 932 (1992) (White and Thomas, JJ., dissenting). As Justice White stated in terms that are applicable here, "the outcome of a federal criminal prosecution should not depend upon the circuit in which the case is tried". Because things have gotten worse since Tomala (as expressed by Professor Robbins, who suggests that the instruction "create[s] a presumption of guilt when there was no evidence of deliberate ignorance"), this Court should take the case, put an end to the conflict, and give guidance on an instruction which, through burgeoning, improper use, snares innocent persons and obliterates the requirement of proof of all elements of a crime beyond a reasonable doubt. Petitioner would not have been convicted in any other Circuit;

he should not have been convicted here.

II. The Court Should Grant The Writ To Enforce The High Standard Of Proof Necessary For A Criminal Conviction As Expressed *Jackson v. Virginia*, 443 U.S. 307 (1979)

In Jackson v. Virginia, 443 U.S. 307, 316-18 (1979), this Court held that the "reasonable doubt" standard imposes a Constitutional duty on federal courts to assure that a criminal conviction is based on more than the existence of "some" evidence that supports a conviction. Rather, it held, Winship requires an evaluation of the quality of the evidence:

> A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence .... A "reasonable doubt," at a minimum, is one based upon "reason." .... Yet a properly instructed jury may occasionally convict even when it can be said that no rational

> trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge .... In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction.... Under Winship, which established proof beyond a reasonable doubt as an essential of ... due process, it follows that when such a conviction occurs in a state trial, it cannot constitutionally stand [footnotes and citations omitted].

Though Jackson establishes a standard of law that appellate courts are bound to enforce, Second Circuit Chief Judge Jon O. Newman observes that the rule of law is not being followed. In Judge Newman's incisive article, Beyond "Reasonable Doubt", 68 N.Y.U.L.Rev. 979 (1993), discussed with approval by Justice Ruth Bader Ginsburg, concurring in Victor v. Nebraska, ___ U.S. ___, 114 S.Ct. 1239 ((1994), Judge Newman expresses grave

concern that, while the "reasonable doubt" standard has been accepted as a verbal formulation to be conveyed in jury charges, appellate courts have failed to take the standard seriously as a rule of law against which the validity of convictions is judged. 68 N.Y.U.L.Rev. at 999. He believes that courts affirm when there is only "some" (if any) evidence of a crime without carefully analyzing to assure that the proof meets the high level of proof required under Winship and Jackson; Judge Newman stated that, if courts were adhering to the standard, one would see many more than the mere two judicial decisions that turned up in a "Westlaw search" where the appellate court had indicated that, while the proof might meet a preponderance standard, it did not

satisfy the "beyond a reasonable doubt" standard. Judge Newman explained that, when courts stress the underscored word "any" in describing what Jackson requires ("the relevant question is whether ... any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt", 443 U.S. at 319) instead of focusing on Jackson's immediately preceding words ("[a]fter Winship the critical inquiry ... must be ... whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt", 443 U.S. at 318), they accept a "less demanding form of review than the `reasonable jury' standard" which the Constitution requires. 68 N.Y.U.L.Rev. at 988. This is because the two sentences "convey quite different

thoughts": the first, "correctly" in Judge Newman's view, "applies the traditional test for determining sufficiency of evidence--namely, whether the law's ubiquitous reasonable person...could find the matter proven by the requisite degree of persuasion"; and the second "shift[ing] the emphasis away from the law's construct of the reasonable jury and conjur[ing] up the image of a vast random distribution of reasonable juries, with the risk of creating the misleading impression that just one of them need be persuaded beyond a reasonable doubt". Id. at 987. As Judge Newman noted (id. at 992):

> In the civil context, the "reasonable person" construct has never been thought to require persuasion of just one out of a random distribution of many. When we ask whether the evidence in a negligence case is sufficient to permit a jury to

> find in the plaintiff's favor, we ask whether a reasonable jury could have concluded that negligence was proved; [footnote omitted] we do not permit a plaintiff's verdict to stand just because it could be said that any one of a thousand reasonable juries could have found in the plaintiff's favor.

We argued in the Court below that in light of Judge Newman's apt concerns about the lack of "meaningful observance of th[e Jackson] standard as a rule of law for testing the sufficiency of evidence", the Court would be unable to find sufficient evidence that Dr. Williams had knowingly joined the scheme. In our briefs, we stressed Judge Newman's formulation of the undue reliance on the Jackson word "any".

As if to give the back of its hand to Judge Newman's concerns, the Second Circuit relied on the underscored "any

rational trier of fact" language that Judge Newman explained signified acceptance of a too-low standard. Then, it did not even take seriously this deferential standard of review. Thus, while the court professed that the evidence must be reviewed as a whole and not in a piecemeal fashion, it isolated bits and pieces that were consistent with guilt, and ignored everything else that colored, contradicted, refuted, or lent context to the paucity of evidence it was able to muster. It went on to accept as fact prosecutorial assertions not rationally based on proven facts, and deemed prosecutorial argument--such as that petitioner acted innocently merely to "cover"--sufficient proof of those "facts" to which it pointed. Especially when it

also allowed proof of what other doctors purportedly had "known", the Court doomed an innocent man to a conviction. This Court should grant certiorari and clarify that Jackson fully applies to appellate review, and should make sure that Courts of Appeal understand that this is not some academic exercise that allows the guilty to go free on a "technicality", but is how guilt is to be determined in the first instance. A proper application of Jackson would result in reversal here.

III. The Writ Should Be Granted So That This Court May Exercise Its Supervisory Powers To Protect The Integrity Of The Federal Courts And To Insure Conformity With Its Ruling In Communist Party v. Subversive Activities Control Board, 351 U.S. 115 (1956).

In Communist Party v. Subversive Control Board, 351 U.S. 115 (1956), this

Court exercised its supervisory functions in relation to proceedings in federal courts and declined to decide an administrative appeal because of a cloud on the record arising out of the petitioner's claim that the agency's factual findings rested on perjurious testimony.[9] This Court held that when an uncontested challenge is made that an agency finding was in part the product of perjurious witnesses, fair administration of justice requires that, before the Supreme Court reviews, the record be

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[9]While the appeal was pending in the Court of Appeals, the petitioner brought to the Court's attention that it had discovered evidence purportedly establishing that the testimony of certain key witnesses before the agency was false. The Government did not deny the allegations, asserting instead (as here) that the evidence went only to credibility and that, in any event, the agency's findings were supported by evidence apart from the testimony of the discredited witnesses. The Court of Appeals decided the appeal without returning case to the agency for consideration of new evidence.

"freed from the challenge that now beclouds it." The matter was remanded to agency with directions to expunge testimony of witnesses from the record if it accepts or finds truth of petitioner's allegations, and then reconsider its original determination.

The Second Circuit declined to follow this Court's example. It not only refused to consider the evidence of perjury by the government's witness that was discovered after trial, but, proclaiming that "credibility is for the jury," determined that, so long as there is no evidence that the prosecutors actually knew of the perjury, it is entriely proper for an appellate court to rely uncritically on a perjuring witness's testimony when reviewing the evidence for sufficiency.

This is perverse. The Court is supposed to be in the business of seeing that justice is done; it is not in the business of playing make-believe. By holding that any perjury was irrelevant to the sufficiency analysis, the Circuit Court promotes fiction over fact and thereby does a disservice to the integrity of the justice system. At the same time, it turns the "reasonable doubt" standard into an empty verbal incantation.

In the article by Second Circuit Chief Judge Jon Newman referred to above, Beyond "Reasonable Doubt", 68 N.Y.U.L.Rev. 979 (1993), Judge Newman argued that a witness's perjury ought to be considered by an appellate court in determining whether a case was sufficient to persuade a reasonable jury beyond a reasonable

doubt:

> Deciding whether a witness speaks the truth is never easy, and judges are no better than jurors at looking inside the mind or heart of a witness and detecting mendacity. But it is a romantic notion that the jury should be an infallible determiner of credibility. It is one thing to permit the jury unfettered discretion to choose between the conflicting accounts of two upstanding members of the community. But it is quite another to defer blindly to their acceptance of testimony from a seriously impeached witness. If a witness is indisputably shown to have lied on prior occasions, perhaps under oath, and is currently in a position to save himself years of jail time by accusing the defendant, does it make sense to say that his testimony standing alone is sufficient to prove guilt beyond a reasonable doubt, simply because twelve jurors have decided to believe him? ...[I]f the other evidence is slender or non-existent, then, at least in some cases, the substantial impeachment of an accusing witness, based on objective facts, should prompt a court to say that a reasonable

> jury (even any rational jury) could not find guilt beyond a reasonable doubt.

Here, the Circuit Court went one step further than that criticized by Judge Newman. It relied on the principle that credibility of witnesses is for the jury even though the jury's assessment of credibility in this case was necessarily flawed since the evidence of perjury was not even before it.

The witness was not only seriously impeached at trial. But hard evidence -- developed by the Government -- demonstrates her mendacity under oath. A reviewing court ought to have the benefit of this evidence before it evaluates the sufficiency of the evidence in general and the witness's testimony in particular. To defer blindly to the jury's acceptance of

the testimony of this witness simply on the ground that "credibility of witnesses is for the jury," makes a mockery of this court's weighty responsibility to the pursuit of the truth.

The panel's refusal to consider the evidence of perjury except in the context of a new trial motion also failed to account for the double jeopardy implications of the situation. Cf. United States v. Aracri, 968 F.2d 1512 (2d Cir. 1992) (while appeal pending, government moved to remand to district court for consideration of whether its failure to disclose certain impeachment materials warranted a new trial; citing, inter alia, Burks v. United States, 437 U.S. 1, 18 (1978), Court denied motion because defendant had raised sufficiency arguments

on appeal that, if accepted, would warrant reversal of their convictions barring a new trial). Stated simply, if a witness's testimony is critical to the government's case and the government knows or should have known that the witness's testimony is untrue, the defendant should not have to suffer a retrial when the perjury is exposed. (Significantly, here, the government promoted the witness's testimony as "standing alone" sufficient to support the conviction, but, it hedged its bets and argued, alternatively, that the evidence was sufficient even without it. The Court, however, apparently finding that the witness's testimony was a critical ingredient in the sufficiency pot, declined the government's invitation to consider the sufficiency of the

evidence without it.)

There are two standards in the Second Circuit for determining whether a new trial should be granted if a witness's perjury is discovered after trial. While, as shown in the footnote below[10], the differing standards reflect an effort to make prosecutors accountable for the knowing introduction of perjured testimony, neither standard accounts for the situation where, as here, the witness's testimony may have made the difference between sufficient evidence and

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[10]Where the prosecutor neither knows not should have known the the witness committed perjury, a new trial must be granted if "but for the perjured testimony, the defendant would most likely not have been convicted." On the other hand, if the Government knew or should have known that its witness was committing perjury, a new trial must be granted if there was "any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Helmsley, 985 F.2d 1202, 1205-06 (2d Cir. 1993) (quoting, United States v. Agurs, 427 U.S. 97, 103 (1976)).

an insufficiently proven case.

We submit that if the prosecutors knew or should have known that testimony the government solicited was false and that testimony makes the difference between sufficiency and insufficiency, it violates a criminal defendant's constitution protection against double jeopardy for the defendant to have to suffer a new trial when the perjury is exposed. The government should not have two bites at conviction -- one in a case built on lies and then a second after being given the chance to build a better case. This Court should grant the writ not only to protect the integrity of the courts which should not rely on false testimony to uphold a conviction, but also to insure that prosecutors have a greater

incentive to confirm the bona fides of their witnesses's stories. See, United States v. Wallach, 935 F2d. 445, 473 (2d Cir. 1991) (government "should have been aware" of witness's perjury; Court fears that given the importance of his testimony to the case, "the prosecutors may have consciously avoided recognizing the obvious - that is, that [witness] was not telling the truth").

CONCLUSION

This Court should grant *certiorari* to enforce the standard of proof beyond a reasonable doubt; to give sorely needed guidance in the law of "conscious avoidance"; and to protect the integrity of the federal courts.

August 17, 1995

Respectfully submitted,

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A P P E N D I C E S

Appendix A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 293, 331, 458, 328, 305, 291—August Term, 1994

(Argued: December 1, 1994 Decided: April 21, 1995)

Docket Nos. 93-1797, -1798, -1799, -1801, -1802, -1895

1995 U.S. App. Lexis 9434

53 F.3d 307

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMSHAID KHAN; CHARLES ADDO YOBO; AUDREY CECILE SADAPHAL; NEPHTALI MONTFORT and PARNELL ST. LOUIS,

Defendants;

MOHAMMED SOHAIL KHAN; JACQUELINE OTERO; DEBORAH WILLIAMS; ROSALY SABA KHALIL; LANCASTER LO and GILBERT ROSS,

Defendants-Appellants.

Before:

FEINBERG, VAN GRAAFEILAND, and MINER,

Circuit Judges.

Appeal from judgments of conviction and sentence entered on November 10 and December 3, 1993 in the United States District Court for the Southern District of New York (Martin, J.) convicting defendants-appellants of (1) conspiring to participate in, and participating in, a racketeering enterprise designed to defraud the New York State Medicaid system, (2) mail fraud, and (3) except as to defendant-appellant Ross, money laundering.

Affirmed in part, reversed in part, and remanded.

KAREN B. SHAER, Assistant United States Attorney, New York, NY (Mary Jo White, United States Attorney for the Southern District of New York, Christopher P. Reynolds, Benjamin E. Rosenberg, Paul G. Gardephe, Assistant United States Attorneys, New York, NY, of counsel) *for Appellee.*

STEPHEN M. GOLDENBERG, New York, NY *for Defendant-Appellant Mohammed Sohail Khan.*

JANE SIMKIN SMITH, Millbrook, NY *for Defendant-Appellant Deborah Williams.*

CAROLYN CORN BICHOUPAN, Carle Place, NY *for Defendant-Appellant Rosaly Saba Khalil.*

SANFORD M. KATZ, New York, NY *for Defendant-Appellant Lancaster Lo.*

VIVIAN SHEVITZ, Mt. Kisco, NY *for Defendant-Appellant Gilbert Ross.*

MINER, *Circuit Judge.*

Defendants-appellants Deborah Williams, Rosaly Saba Khalil, Lancaster Lo and Gilbert Ross appeal from judgments of conviction and sentence entered on November 10, 1993, in the United States District Court for the Southern District of New York (Martin, J.) following a jury trial. Defendant-appellant Mohammed Sohail Khan appeals from a judgment of conviction and sentence entered on December 3, 1993, in the same court, after a plea of guilty.[1] All defendants-appellants were convicted of conspiring to participate in, and participating in, a racketeering enterprise designed to defraud the New York State Medicaid system, in violation of 18 U.S.C. § 1962(c) and (d), and mail fraud, in violation of 18 U.S.C. § 1341, and each defendant-appellant, with the exception of Ross, was convicted of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i).

Williams was sentenced to forty-one months in prison, restitution of $1,814,896 to the State of New York, and forfeiture of $50,000 to the United States. Khalil was sentenced to forty-one months in prison, restitution of $1,931,992, and forfeiture of $90,000. Lo was sentenced to thirty-seven months in prison, restitution of $1,319,000, and forfeiture of $95,000. Ross was sentenced to forty-six months in prison, restitution of

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[1] Defendant-appellant Jacqueline Otero also pleaded guilty. Before us is a motion by the government for summary affirmance of her conviction and sentence and a motion by her attorney to be relieved of the duty of representation. *See Anders v. California*, 386 U.S. 738 (1967).

$612,855, and forfeiture of $40,000. Khan was sentenced to sixty months in prison and restitution of $8,000,000. Each defendant-appellant also received a term of supervised release and a special assessment.

BACKGROUND

At trial, the government set out to prove that, from February 1990 through June 1991, the defendants and others participated in a racketeering enterprise that defrauded the New York State Medicaid system ("Medicaid") of approximately $8,000,000. Khan was the leader of the enterprise, which operated through four clinics (the "Khan clinics") located at 1153 and 1826 Grand Concourse in the Bronx, and at 461 Lenox Avenue and 2301 Second Avenue in Manhattan, through the Ridgewood Pharmacy at 1153 Grand Concourse in the Bronx, and through two corporations controlled by Khan, Manhasset Diagnostics, Inc., and Manhasset Community Management Services, Inc.

The government presented its case through the testimony of cooperating co-conspirators, including Khan, two physicians who worked at the clinics, Charles Addo-Yobo and Audrey Cecile Sadaphal, two physicians' assistants named Melville Ferns and James Rich, and Carmen Guzman, who was employed as a secretary and, later, as an office manager at one of the clinics. The government also presented the expert testimony of physicians associated with the New York State Department of Social Services ("DSS"), testimony from DSS employees, two of whom posed as patients at the Khan clinics, and the testimony of two actual patients. In addition, the government introduced inculpatory as well as false exculpatory statements made by each of the defendant-

physicians as well as thousands of patient files seized from the Khan clinics and bills sent to Medicaid.

The evidence illustrated the following scheme to defraud: Indigent patients, many of whom were homeless, alcoholic, or drug-addicted, came to the clinics to obtain prescriptions for drugs for which they had no medical need. The patients often would fill the prescriptions at a local pharmacy and then sell the drugs on the street. To obtain the prescriptions, the patients provided the clinics with valid Medicaid recipient numbers, underwent medically unnecessary procedures and tests, and gave blood samples. Physicians' assistants ("PAs"), who performed the vast majority of the patient diagnoses, saw approximately twenty-five to forty patients each weekday at the clinics. The PAs seemed fully aware of the fraud and made no pretense of legitimate treatment. Doctors rarely were on the premises of the clinics.

Medicaid was billed for each patient visit and office test. In addition, each blood sample was sent to Clin Path, a medical laboratory located in New Jersey, which, in turn, billed Medicaid for every blood test. Clin Path "kicked back" twenty-seven percent of its Medicaid receipts to Khan. Khan was the primary organizer of the scheme; he leased the space for the clinics, purchased what limited medical supplies were provided, and hired and paid the PAs. Khan advertised for the physicians by placing advertisements in the New York Times, promising "[v]ery, very good $$." Because only a medical doctor could qualify as a Medicaid provider, Khan could not operate the scheme without the physicians.

The physicians received Medicaid payments for office visits and tests purportedly performed at the clinics. Of these payments, the physicians would "kick back" thirty

to forty percent to Khan. The payments from the physicians eventually were disguised as rent payments. Under this arrangement, each physician entered into a lease agreement with Khan in which the physician agreed to pay Khan $1500 per week rent. This payment did not correspond to the actual rent paid by Khan for the premises.

The Khan clinics were unusual in a number of ways. They lacked substantial medical equipment and were very dirty and unsanitary. In some of the clinics, signs hung from the walls instructing patients not to discuss their prescriptions with one another. The patients consisted mainly of men between the ages of twenty-five and forty-five, in contrast to the diverse patient-mix that might be expected in the urban areas where the clinics were located. Such a mix would include children, women, and elderly persons. There never were any emergencies or hospital referrals, and every patient was a Medicaid recipient. Finally, the clinics had a policy of limiting follow-up visits. This policy was expressed at the 2301 Second Avenue clinic, for example, by a sign stating "no more old patients for tomorrow." While medically indefensible, the policy reduced the number of less-lucrative second visits that the clinics might expect. To accomplish the same purpose, repeat patients often were treated as "first-time" patients at several of the clinics.

The physician-appellants rarely examined any patients themselves;[2] the work was done by the PAs. The PAs would see each patient for only a few minutes. The clinics' records indicated that virtually all of the patient

[2] There was evidence that Williams saw some patients on Saturdays, but she also "supervised" PAs during the week, even though she was not present at the clinics during that time.

complaints were described in one of a very limited number of ways; nearly all of the blood samples taken were analyzed under one of four highly specialized (and expensive) tests; hearing tests were ordered for patients whose charts indicated no hearing problem; EKG tests lacked required interpretation, and some EKG graphs were cut into pieces and distributed among the files of various patients. Charles Addo-Yobo and Audrey Sadaphal, physicians who worked at the clinics, testified that they realized almost immediately that the clinics were not legitimate, and that they were fraudulently billing Medicaid.

Following a three and a half week trial, the jury found Williams, Khalil and Lo guilty of all charges and Ross guilty of all charges except money laundering. The district court imposed sentence upon the four physician-appellants as well as upon Khan, who pleaded guilty. On appeal, Williams, Khalil, Lo, and Ross challenge the sufficiency of the evidence presented at trial and make various claims of error in regard to evidentiary rulings and the jury charge. Further, each defendant challenges portions of his or her sentence and each defendant, with the exception of Khan, challenges the district court's assessment of restitution.

DISCUSSION

I. EVIDENTIARY SUFFICIENCY CLAIMS

The physician-appellants argue that the evidence was insufficient to establish their knowledge of the fraudulent nature of the clinics' operations, and Ross further argues that there was insufficient proof of the existence of a pattern as required under RICO.

In determining whether the evidence was sufficient to convict the defendants, "we must view the evidence in the light most favorable to the government and construe all possible inferences in its favor." *United States v. Badalamenti*, 794 F.2d 821, 828 (2d Cir. 1986); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The standard is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis in original). In making this determination, we do not engage in piecemeal review, but rather, we review the evidence as a whole. *United States v. Carson*, 702 F.2d 351, 362 (2d Cir.), *cert. denied*, 462 U.S. 1108 (1983). Moreover, the government may prove membership in a conspiracy by circumstantial evidence alone, *United States v. Miranda-Ortiz*, 926 F.2d 172, 176 (2d Cir.), *cert. denied*, 502 U.S. 928 (1991), and a defendant may be convicted of conspiracy even though he is unaware of all the conspiracy's unlawful aims, as long as he has knowledge of some of those aims, *see United States v. Lanza*, 790 F.2d 1015, 1022-23 (2d Cir.), *cert. denied*, 479 U.S. 861 (1986). Finally, the government can prove knowledge by showing that "the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993).

A. Evidence of Knowledge

1. Williams

Williams argues that the evidence presented at trial was insufficient to prove that she had knowledge of the scheme to defraud Medicaid. We disagree. The leader of the enterprise, Mohammed Sohail Khan, testified that Williams was aware of his relationship with Clin Path

and that she agreed to pay him forty percent of her Medicaid receipts. To this end, Williams entered into a bogus lease agreement under which she agreed to pay Khan $1500 per week for rent. Khan also testified that, in May of 1991, he was notified that he and all the physicians were to be excluded from Medicaid. He said that when he told Williams that he was going to close the clinics because he did not "want to be a front anymore," she volunteered to take over as the "front," with Khan paying her expenses from the money that he received from Clin Path. The clinics remained in operation until July of 1991, when Clin Path lost its certification from Medicaid.

Other co-conspirator evidence inculpating Williams included the testimony of Dr. Sadaphal, who testified that she became concerned when she realized that all the patient charts had remarkably similar diagnoses. When Sadaphal asked Williams about these similarities, Williams "misled" her by claiming that the similarities were representative of the community in which the clinics were located. Also, a patient named Larita Mitchell testified that she gave the receptionist a list of fake ailments and then met with Williams in an examination room. Mitchell said that Williams did not ask her any questions and did not perform a medical exam and, after a short while, Williams simply told Mitchell to "go next door and take blood." After giving blood, Mitchell obtained her prescription and left; she had the prescription filled and sold the drugs on the street.

Williams argues that Mitchell was not credible because she was a crack addict and falsely testified that she recalled meeting Dr. Williams because it was the same day she took her son to the Boy Scouts when there was no Boy Scouts meeting. The government conducted

a painstaking investigation into allegations that Ms. Mitchell's testimony was perjured. The results were inconclusive, but in any event there is no evidence that the government had knowledge of any perjury when it proffered Ms. Mitchell as a witness. Moreover, Ms. Mitchell's credibility was vigorously disputed before the jury. The jury, after hearing this testimony, was permitted to assess the credibility of these witnesses and to draw reasonable inferences. *See Lanza*, 790 F.2d at 1019.

The government also presented expert testimony indicating that the number of similar diagnoses was "statistically not possible." Finally, evidence of the lack of medical supplies at the clinics and of the presence of signs discouraging repeat visits was put before the jury. All this evidence supplied the jury with enough evidence to allow a reasonable juror to conclude beyond a reasonable doubt that Williams knew of the fraud, *see id.*, or that Williams consciously avoided confirming its existence, *see Rodriguez*, 983 F.2d at 458.

2. Khalil

Khalil contends that, because she rarely was at the clinics and took no active role in the medical care given there, the evidence was not sufficient for a jury to find that she had the requisite knowledge of the criminal nature of the scheme. This contention is without merit.

First, Khalil urges this court to discredit Khan's testimony. However, the credibility of witnesses is the province of the jury and we simply cannot replace the jury's credibility determinations with our own. *See United States v. Losada*, 674 F.2d 167, 173 (2d. Cir.), *cert. denied*, 457 U.S. 1125 (1982).

Second, the fact that Khalil rarely was present at the clinics simply highlights the reasonableness of the jury's inference that a physician who received substantial remuneration for doing almost no medical work or supervision is aware of the fraudulent nature of her conduct. Khalil received $138,816 from Medicaid during her seven-month association with the clinic. Furthermore, there was evidence that Khalil made several conflicting statements regarding the amount of time she spent at the clinics doing work and whether she actually treated patients or merely supervised the PAs. The government also presented expert testimony indicating that the medical and blood tests ordered for Khalil's patient's were medically unnecessary. This evidence was sufficient for reasonable jurors to infer knowledge beyond a reasonable doubt.

3. Lo

Lo also argues that there was insufficient proof that he knew of the fraudulent nature of the scheme. Again, we disagree. The evidence showed that Lo was associated with the Khan enterprise from July to December 1990, at which time he was barred from the Medicaid program. During this period, he received over $100,000 for doing essentially no work. In addition, when Medicaid requested an exit conference in which Lo could explain his billings, he failed to appear. As with the other defendants, the government presented expert testimony establishing the facially fraudulent nature of Lo's patient documentation. Finally, there was testimony that, when a PA was diagnosing men with a condition commonly occurring in women, Lo, without seeing any patients, brought this discrepancy to the PA's attention and provided an alternative diagnosis that would allegedly justify the ordered medication.

4. Ross

Ross contends that the evidence was insufficient to establish his knowledge of the clinics' fraudulent nature.. His contention also is without merit. Aside from the expert testimony indicating the fraudulent nature of Ross' patients' charts, there was specific evidence of Ross' knowledge. Ross was present at the clinic for approximately three days each week, and therefore had ample opportunity to observe the utterly inadequate facilities. In addition, he met with staff members in the area where signs were posted indicating that only new patients were welcome. Finally, in March of 1991, after a DSS representative had taken custody of twenty of Ross' files, Ross sent a letter to his PA directing that a certain drug be prescribed only when the condition for which it should be prescribed is present. The timing of this letter in connection with the DSS audit is evidence that Ross wrote the letter to cover his tracks. Ross left the clinic shortly after this incident.

Ross also chose to testify at trial. "By taking the stand and offering his own version of events, [the defendant] waives any claim as to the sufficiency of the Government's case considered alone." *United States v. Friedman*, 998 F.2d 53, 57 (2d Cir. 1993)(internal quotations omitted). Ross testified at trial that he had no knowledge of the fraud at the Khan clinic, and the jury obviously rejected this testimony. Under *Friedman*, the jury was entitled to consider Ross' credibility in determining his knowledge.

Moreover, the evidence also was consistent with conscious avoidance. When Ross was informed that all of the patients came in with the same complaints, he did nothing. When the PA suggested to Ross that he speak to

Khan about a nonsensical prohibition on urinalysis, Ross did nothing. This, and the evidence mentioned above, is consistent with awareness of a high probability of the criminal nature of the scheme and the decision to avoid confirming its criminality. *See Rodriguez*, 983 F.2d at 458.

B. Pattern of Racketeering

Ross argues that, because he was at the Khan clinics for no more than nine weeks, his conduct cannot amount to a pattern of racketeering activity. We disagree. To demonstrate "a pattern of racketeering activity" under 18 U.S.C. § 1962(c), the government must prove "relatedness" and "continuity or a threat of continuity." *United States v. Indelicato*, 865 F.2d 1370, 1381 (2d Cir.) (in banc), *cert. denied*, 493 U.S. 811 (1989).

Relatedness can be established by showing that the predicate acts had "the same or similar purposes, results, participants, victims, or methods of commission." *Id.* at 1382 (internal quotations omitted). In this case, all the predicate acts of mail fraud were performed in the same way with the same purpose—to defraud Medicaid. Accordingly, relatedness was clearly established in this case.

In regard to continuity, the Supreme Court has noted that "the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 242 (1989). The entity, moreover, may be a legitimate business that regularly engages in illicit activity. *See id.* at 243. In light of these principles, it seems clear that there was a "threat of continuity" present here, because the clinics regularly engaged in defrauding Medicaid.

II. EVIDENTIARY CLAIMS

Although several defendants challenge various evidentiary rulings made at trial, only Williams' claim warrants discussion here. Williams argues that the substance of two telephone conversations that she had with DSS representatives, and reports of those calls, were admitted improperly at trial. We find that the district court did not abuse its discretion in receiving this evidence because there was adequate circumstantial evidence to establish its reliability.

The first telephone call involved Virginia Hale, a DSS representative. Hale testified that, on June 26, 1990, DSS received a provider enrollment application from Williams. Williams does not challenge the fact that she signed and submitted the form, which included a telephone number where she could be contacted. Hale placed a call to that number, which turned out to be one of the Khan clinics, and left a message for Williams to call her back. Later that day, Hale received a telephone call from a woman who identified herself as Williams, and who confirmed the address where the Medicaid checks were to be sent and provided information about one of the clinics. The person also stated that she would check with her "partner" to see if the clinic at which she would be working was certified in New York State. Hale made a written record of the conversation.

The second phone call was described by Anna Graham, who worked with Hale at DSS. Graham testified that on June 28, 1990, she received and made a written record of a telephone call from a woman who identified herself as Williams. During the conversation, the woman stated that the clinic would be licensed as a private office, and that she wanted to enroll as an individual provider.

Williams objected to the admission of the testimony, claiming that there was an insufficient foundation to demonstrate that she was the person making the calls. Authentication generally requires "evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). While a mere assertion of identity by a person talking on the telephone is not in itself sufficient to authenticate that person's identity, some additional evidence, which "need not fall in[to] any set pattern," may provide the necessary foundation. Fed. R. Evid. 901(b)(6), Advisory Committee notes, example 6. "[S]elf-identification of *the person called* at a place where he reasonably could be expected to be has long been regarded as sufficient" for authentication purposes. *O'Neal v. Morgan*, 637 F.2d 846, 850 (2d Cir. 1980) (emphasis supplied), *cert. denied*, 451 U.S. 972 (1981). On the other hand, self-identification by a person *who makes a call*, alone, is insufficient for authentication purposes, especially where there are other members of a conspiracy who could have made the call. *See United States v. Zane*, 495 F.2d 683, 696-97 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974). In this case, it is alleged that Williams made the telephone call. Hence, the question becomes whether the circumstances adequately established that Williams was more likely than not the caller. We believe that they do.

First, the calls in question were made in response to a call by Hale to a number that Williams had provided. Hale left a message for Williams and received a return telephone call the same day. Usually, people provide telephone numbers where they reasonably believe they can receive a message. *See Noriega v. United States*, 437 F.2d 435, 436 (9th Cir.) (call made by defendant properly authenticated where defendant provided witness

with a number, witness left message for defendant and defendant returned the call), *cert. denied*, 402 U.S. 908 (1971). Hence, the circumstances indicate that Williams believed she would receive messages that were left at that location. Second, during this period, there is no question that Williams was seeking the Medicaid provider number that she eventually received, indicating her strong interest in returning the call. Third, the caller provided Williams' father's address as the address to which Medicaid payments should be sent. These circumstances provide a sufficient basis to admit the telephone calls.

III. THE JURY CHARGE

A. Balancing Language

Williams and Ross argue that the conscious avoidance charge to the jury was fatally flawed because it failed to include balancing language. Because they failed to raise this claim at trial, we review it for plain error. *See United States v. Civelli*, 883 F.2d 191, 194 (2d Cir.), *cert. denied*, 493 U.S. 966 (1989). In *United States v. Feroz*, 848 F.2d 359, 360 (2d Cir. 1988) (per curiam), we said that a "conscious avoidance" charge should indicate to the jury that "knowledge of the existence of a particular fact is established (1) if a person is aware of a high probability of its existence, (2) unless he actually believes that it does not exist." We have cautioned prosecutors in this circuit to "request that the 'high probability' and 'actual belief' language be incorporated into every conscious avoidance charge." *Id.* at 361.

Here, the prosecutor requested that the "actual belief" language be included in the charge, but the trial court failed to comply with the request. The court, however,

did include the "high probability" language in the charge. Moreover, the court explained that "the necessary knowledge cannot be established by a showing that a defendant was careless, negligent, or foolish." While the court failed to give the preferred charge, the charge as given did not constitute plain error "going to the very essence of the case." *See United States v. Bradley*, 812 F.2d 774, 778 (2d Cir.) (internal quotations omitted), *cert. denied*, 484 U.S. 832 (1987).

B. Constructive Amendment

Williams and Ross claim that the jury charge constructively amended the indictment in violation of the Fifth Amendment by changing the nature of the fraud scheme and the RICO enterprise. We disagree. An indictment is constructively amended when the evidence admitted at trial and the jury instructions create a substantial likelihood that the defendant was convicted of an offense not charged in the indictment. *See United States v. Miller*, 471 U.S. 130, 136-40 (1985). Where the evidence or jury instructions narrow an offense that is more broadly contained in the indictment, however, the indictment is not constructively amended in violation of the Fifth Amendment. *Id.* at 136.

Williams argues that the indictment was amended because the scheme alleged in the indictment focused on the prescription of unnecessary drugs to patients who then sold them on the street, whereas the evidence and charge focused on the billing of Medicaid for unnecessary medical procedures. The indictment, however, clearly indicated that the physicians' role in the fraud consisted of fraudulently billing Medicaid and therefore was not constructively amended.

Williams and Ross also argue that the charge amended the indictment because the indictment mentioned Ridgewood Pharmacy, Manhasset Community Management Service, and Manhasset Diagnostic as part of the scheme, whereas the evidence and charge focused on the four clinics. Khan testified that he was affiliated with Ridgewood Pharmacy and that fraudulent prescriptions would be filled there. The two other entities were set up by Khan and received the lease payments from the defendant-physicians. All these entities thus were related to the scheme. Moreover, even if the evidence at trial and the charge to the jury led to the conviction of the physicians solely on the basis of their relationships with the clinics, the conviction would be for a narrower offense than that contained in the indictment. Therefore, the defendants could not have been convicted for offenses that were not charged in the indictment. *See id.*; *see also United States v. Mucciante*, 21 F.3d 1228, 1236 (2d Cir.) (no constructive indictment where "nothing new was added to [the] indictment"), *cert. denied*, 115 S. Ct. 361 (1994).

IV. SENTENCING ISSUES

Defendants raise numerous challenges to their sentences. The district court calculated the loss component of each physician's offense level by determining the fee charges attributed to the respective physician's Medicaid provider number. Beginning with a base offense level of 6, U.S.S.G. § 2F1.1, the court adjusted upward according to the loss incurred by the fraud. The loss amounts and corresponding resultant levels were as follows: Williams, $1,814,896 for an increase to level 18; Khalil, $1,931,992 for an increase to level 18; Lo, $1,319,146 for an increase to level 17; Ross, $776,414 for an increase to level 16. Each physician then received a two-

level enhancement for more than minimal planning, *see* U.S.S.G. § 2F1.1(b)(2)(A), and a two-level enhancement for abuse of a position of trust, *see* U.S.S.G. § 3B1.3. The district court also imposed a two-level enhancement on Ross for obstruction of justice, based on the finding that Ross had perjured himself at trial. *See* U.S.S.G. § 3C1.1. The resultant levels and corresponding guidelines ranges were: Williams, Khalil, and Ross, level 22 (forty-one to fifty-one months), and Lo, level 21 (thirty-seven to forty-six months). Each physician was then sentenced at the bottom of the applicable range.

A. Foreseeability of Loss/Inclusion of Loss

Williams, Khalil, and Ross claim that the district court erred in finding that the reasonably foreseeable losses included all services that were billed to their Medicaid provider number. We disagree. The district court found that no medical care whatsoever was administered at the clinics and that all the billings were fraudulent. Based on the record in this case, the court's findings are not clearly erroneous. *See* 18 U.S.C. § 3742(e).

B. Khan's Challenge to the Upward Departure

Khan argues that the district court erred in departing upward from his guidelines range. This argument is without merit. A sentencing court may impose a sentence outside the guidelines if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b); *see* U.S.S.G. § 5K2.0. The district court must first determine whether certain factors may warrant a departure, a determination that we review *de novo*, *see United States v. Rogers*, 972

F.2d 489, 492 (2d Cir. 1992). Once it has been established that certain circumstances may warrant a departure, the district court has "wide discretion" in determining whether to depart. *See United States v. Colon*, 905 F.2d 580, 584 (2d Cir. 1990).

Khan's original guidelines range was forty-six to fifty-seven months in prison. The district court then delineated three grounds for imposing an upward departure. First, the court noted that the guidelines failed to adequately account for the enormous health risks posed by the scheme. Second, it noted that this scheme undermined the public's confidence in government systems like Medicaid to the detriment of Medicaid recipients. Third, the court was concerned with Khan's role in inducing doctors to abuse their positions of trust. After upwardly departing to an offense level of thirty-two and a corresponding guidelines range of 121 to 151 months, the court granted the government's request for a downward departure, pursuant to section 5K1.1, and sentenced Khan to sixty months in prison. Each departure will be discussed in turn.

In circumstances where the financial loss "does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted," particularly where "the fraud caused or risked reasonably foreseeable, substantial non-monetary harm." U.S.S.G. § 2F1.1, comment 10(a). Here, the court found that the scheme created a substantial health risk to patients, most of whom were alcoholics or drug addicts, because the clinics administered medical exams and dispensed prescription drugs without regard to the patients' needs. This resulted in uniformly poor medical treatment to a population that sorely needed treatment. These factors clearly warranted a departure.

The effect on Medicaid was also appropriately used as a basis for departure. U.S.S.G. § 5K2.7 identifies "disruption of a governmental function" as a factor that may warrant an upward departure. Here, the district court found that the scheme not only disrupted the government's function of efficiently administering Medicaid, but also undermined the public's confidence in government. These factors were not adequately taken into account by the Sentencing Commission. *See United States v. Flinn*, 987 F.2d 1497, 1499, 1504-05 (10th Cir. 1993). Accordingly, the district court properly considered these factors as grounds for a departure.

The departure based on Khan's role in inducing others to abuse positions of trust also was appropriate. Khan initiated this scheme and put his organizational skills behind it. Although he received an enhancement under section 3B1.1(a) for being the organizer or leader of the scheme, the district court found that the guidelines did not adequately take into account his role in inducing the doctors to breach their positions of trust. We find that this case is not in the heartland of conspiracies to defraud and thus that the court's reliance on this factor as a basis for departure was proper.

In regard to the district court's discretion to depart under the circumstances of this case, we find that the court did not abuse its discretion by departing for each of the three factors discussed above.

C. Consideration of Section 3664 Factors

Williams, Ross, Lo and Khalil argue that the district court abused its discretion by failing to consider the financial resources of the defendants and the needs of the defendants' dependents, as required under 18 U.S.C. § 3664, when imposing restitution. We agree. Section

3663(a) provides that the district court, in sentencing a defendant, may order that the defendant make restitution to any victim of such offense. Section 3664(a) provides that in determining whether to order restitution and its amount, the sentencing court

> shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

"[T]here is no requirement that specific findings be made on each factor," *United States v. Gelb*, 944 F.2d 52, 56 (2d Cir. 1991), and the defendant bears the burden of proof as to these factors, 18 U.S.C. § 3664(d). Nevertheless, "the record must demonstrate that the court has considered these factors in ordering restitution." *United States v. Tortora*, 994 F.2d 79, 81 (2d Cir. 1993).

Here, the amount of restitution ordered by the district court is equivalent to the loss occasioned by each defendant. The record does not indicate whether the court considered the financial resources of the defendants or the financial needs and earning ability of the defendants and their dependents. It appears that the district court simply "identified the amount owed . . . and imposed [the] full amount" on the defendants, and this is an abuse of discretion. *See Tortora*, 994 F.2d at 81. Thus, we must remand for the district court to consider the statutory factors that bear on the issue of restitution. Upon remand, the court may consider the amount of forfeiture each physician-appellant was ordered to pay as well. *See United States v. Porcelli*, 865 F.2d 1352, 1355, 1364-65 (2d Cir.), *cert. denied*, 493 U.S. 810 (1989).

The district court ordered that defendants Williams, Khalil, and Lo make their restitution payments according to a schedule determined by the Probation Department as a special condition of their supervised release. However, we have recently held that the sentencing court cannot "authoriz[e] a probation officer to make post-sentencing decisions as to either the amount of restitution, or the scheduling of installment payments." *United States v. Porter*, 41 F.3d 68, 71 (2d Cir. 1994) (citations omitted). Therefore, the district court must revise its restitution orders to comply with our ruling in *Porter*. The district court also authorized the Probation Department to schedule the payments for Khan's restitution order. Accordingly, we remand that portion of Khan's sentence to allow the court to comply with *Porter*. *See id.*

As to defendant-appellant Jacqueline Otero, we grant only so much of the government's motion for summary affirmance as relates to her conviction and to her sentence in regard to the district court's determination of loss attributable to her and the imposition of a two-point enhancement for more than minimal planning, *see* U.S.S.G. § 2F1.1(b). We deny so much of the government's motion for summary affirmance as relates to the restitution order in which the court authorized the Probation Department to set a schedule of payments. As discussed above, this practice is contrary to our ruling in *Porter*, 41 F.3d at 71, and we therefore remand for the district court to determine her schedule of payments of restitution. We also deny the motion of Otero's attorney to be relieved from representing Otero on this appeal. *See Anders v. California*, 386 U.S. 738 (1967).

We have considered all of the defendants' other arguments as well as their motions in this court and find them to be without merit.

CONCLUSION

For the foregoing reasons, the case is remanded for the district court to consider the section 3664(a) factors on the record regarding the restitution ordered for defendants Williams, Ross, Lo, and Khalil, and to revise the restitution orders regarding the schedule of payments to comply with *Porter*, 41 F.3d at 71. In all other respects the judgments of conviction and sentence are affirmed.

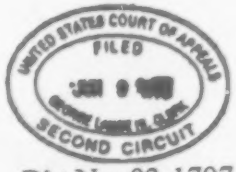
Appendix B

Order of the United States Court of Appeals For the Second Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 Foley Square
New York 10007

GEORGE LANGE III
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of June on thousand nine hundred and ninety-five.



USA

Appellee ,

v.

Khan Defendant-Appellant Dkt No: 93-1797

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant GILBERT ROSS.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III. CLERK
BY: Beth J. Meador

Beth J. Meador Date 6/9/95
Administrative Attorney

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Supreme Court, U.S.
FILED
NOV 17 1995
CLERK

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Nos. 95-289 and 95-290

In the Supreme Court of the United States

OCTOBER TERM, 1995

DEBORAH WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

GILBERT ROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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31 pp

QUESTIONS PRESENTED

1. Whether the court of appeals employed the correct standard of review in assessing the sufficiency of the evidence.

2. Whether the court of appeals properly considered the testimony of government witness Larita Mitchell in assessing the sufficiency of the evidence against petitioner Williams.

3. Whether there was sufficient evidence that petitioner Ross participated in the conduct of an enterprise through a pattern of racketeering activity.

4. Whether the district court correctly instructed the jury that it could infer knowledge from deliberate ignorance.

5. Whether the district court erred in restraining petitioner Ross's assets prior to sentencing pursuant to the All Writs Act, 28 U.S.C. 1651.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

NO. 95-289

DEBORAH WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

NO. 95-290

GILBERT ROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (95-289 Pet. App. 1a-24a; 95-290 Pet. App. 1a-24a)[1] is reported at 53 F.3d 507.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1995. A petition for rehearing was denied on June 9, 1995. Pet. App. 25a. The petitions for a writ of

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[1] When citing the court of appeals' opinion in this brief, we refer exclusively to the appendix to the petition in No. 95-290.

certiorari were filed on August 21, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on one count of racketeering, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c); one count of conspiring to engage in racketeering, in violation of 18 U.S.C. 1962(d); and numerous counts of mail fraud, in violation of 18 U.S.C. 1341. In addition, petitioner Williams was convicted on nine counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i). Gov't C.A. Br. 2-3.[2] Petitioner Williams was sentenced to 41 months' imprisonment, to be followed by a three-year term of supervised release. In addition, she was ordered to pay $1,814,896 in restitution to the New York State Department of Social Services (DSS) and to forfeit $50,000 to the United States. Petitioner Ross was sentenced to 46 months' imprisonment, to be followed by a three-year term of supervised release. He was also ordered to pay $612,855 in restitution to DSS and to forfeit $40,000 to the United States. *Id.* at 3-4; Pet. App. 3a-4a. The court of appeals affirmed the convictions, but remanded for reconsideration of the restitution orders. Pet. App. 1a-24a.

1. a. From February 1990 through June 1991, petitioners participated in a racketeering enterprise that defrauded the New York State Medicaid System

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[2] Petitioner Ross was acquitted on two counts of money laundering. Gov't C.A. Br. 3.

of more than $8 million. The enterprise, headed by Mohammed Sohail Khan, operated through four sham clinics located in the New York City area. The scheme operated as follows: Indigent patients came to the Khan clinics to obtain prescriptions for expensive drugs for which they had no medical need, and later resold the drugs on the street for cash.

To obtain the prescriptions, the patients provided the Khan clinics with valid Medicaid recipient numbers, underwent medically unnecessary procedures and tests, and gave blood samples. The patients were typically seen by Physicians' Assistants (PAs), who were fully aware of the fraud and made no pretense of legitimate treatment. Doctors were rarely on the premises at any of the clinics, and provided no meaningful supervision over the PAs. Pet. App. 4a-5a.

Medicaid was billed for each patient visit and office test. Moreover, each blood sample was sent to Clin Path, a medical laboratory located in New Jersey, which, in turn, billed Medicaid for every blood test. Clin Path "kicked back" 27% of its Medicaid receipts to Khan. Khan was the primary organizer of the scheme: he leased the space for the clinics, purchased what limited medical supplies were provided, and hired and paid the PAs. Khan advertised for the physicians in the New York Times, promising "[v]ery, very good $$." Physicians were essential to the success of the operation, because only a physician could qualify as a Medicaid provider. Pet. App. 5a.

The physicians received Medicaid payments for office visits and tests purportedly performed at the clinics. Of those payments, the physicians would "kick back" 30-40% to Khan. Eventually, the physicians' payments to Khan were disguised as rent payments. Under this arrangement, each physician en-

tered into a lease agreement with Khan in which the physician agreed to pay Khan rent of $1500 per week —an amount that did not correspond to the actual rent paid by Khan for the premises. Pet. App. 5a-6a.

The Khan clinics were unusual in many ways. They lacked substantial medical equipment and were very dirty. In some of the clinics, signs instructed patients not to discuss their prescriptions with one another. The patients were not a normal mix of children, women, and the elderly, but were mainly men between the ages 25 and 45. There were never any emergencies or hospital referrals, and every patient was a Medicaid recipient. Finally, the clinics had a policy of limiting follow-up visits, expressed, for example, by a sign at one of the clinics that stated "no more old patients for tomorrow." This medically indefensible policy reduced the number of less-lucrative second visits the clinics might otherwise expect. To accomplish the same purpose, repeat patients often were treated as "first-time" patients at several of the clinics. Pet. App. 6a.

The physicians rarely examined any patients themselves. Rather, the PAs would examine the patients, seeing each one for only a few minutes. Clinic records indicated that virtually all the patient complaints were described in one of a very limited number of ways, a coincidence that was statistically impossible. Nearly all the blood samples taken were analyzed under one of four highly specialized and expensive tests. Hearing tests were ordered for patients whose charts indicated no hearing problem. Moreover, EKG tests lacked the required interpretation, and some EKG graphs were cut into pieces and distributed among the files of various patients. Two physicians who worked at the clinics testified

that they realized almost immediately that the clinics were not legitimate, and that they were fraudulently billing Medicaid. Pet. App. 6a-7a, 10a.

b. Petitioner Williams was one of the physicians employed at the Khan clinics. Khan testified at trial that Williams was aware of Khan's relationship with Clin Path and that Williams agreed to pay Khan 40% of her Medicaid receipts. To this end, Williams entered into a bogus lease agreement under which she agreed to pay Khan $1500 per week for rent. Khan further testified that in May 1991 he was notified that he and all the physicians were to be excluded from Medicaid. He said that when he told Williams that he was going to close the clinics because he did not "want to be a front anymore," Williams volunteered to take over as the "front," with Khan paying her expenses from the money he received from Clin Path. Pet. App. 8a-9a.

Dr. Sadaphal, another physician who worked at the clinics, testified that she became concerned about the remarkably similar diagnoses on all the patient charts, and asked Williams about the similarities. Williams "misled" Sadaphal by claiming that the similarities were representative of the community in which the clinics were located. Patient Larita Mitchell testified that after giving the receptionist a list of fake ailments, she met with Williams in an examination room. Williams did not ask her any questions or perform a medical exam. Rather, Williams simply told Mitchell to "go next door and take blood." After giving blood, Mitchell obtained her prescription, had it filled, and resold the drugs on the street. Pet. App. 9a.

An examination of the charts of patients seen by Williams and by the PAs supervised by her reflected

no real evidence of medical treatment. Rather, the charts showed that unwarranted tests were done on the patients, and that unwarranted medication was prescribed for them. Moreover, a DSS physician reviewed the charts for 25 of Williams' patients and found that the patient complaints were strikingly similar. All 25 patients complained of ulcers, and all but two complained of both hypertension and asthma. All three of the patients personally seen by Williams were diagnosed with hypertension, notwithstanding that one patient's chart indicated a normal blood pressure, and another contained no blood pressure reading at all. Moreover, a review of the 25 charts showed that Williams had approved and billed Medicaid for 22 hearing tests ordered by the PAs, even though the patients' histories, set forth in the charts, indicated no hearing loss. The charts also showed that Williams had authorized complex blood tests for all but one of the 25 patients, and made no attempt to follow up abnormal results. Gov't C.A. Br. 25-26.

c. Petitioner Ross was another physician employed at the clinics. At their first meeting, Khan explained that Ross would have to give him 40% of his Medicaid receipts, and that they would enter into a lease agreement to mask the fee-splitting. Physician's Assistant Melville Ferns, who was present at the meeting, explained that all the patients came in with the same complaints, and that Ross would write them prescriptions. Ross "swallowed," but said nothing. Ross subsequently agreed to associate himself with one of the clinics. Gov't C.A. Br. 39. Thereafter, Ross was present at the clinic for approximately three days each week, and met with staff members in the area where signs were posted

indicating that only new patients were welcome. During an early meeting, Khan told Ross that a patient that had been seen by another clinic physician would be seen by Ross and treated as a "new" patient. Khan explained that by recycling patients in that fashion, each doctor could maximize profits by charging Medicaid for a first comprehensive visit and certain testing, including a full blood work-up. Khan showed Ross the notebook used to keep track of which patients would be "new" for which doctor. Ross looked at the notebook and responded, "Looks like all the corners are covered." Pet. App. 12a; Gov't C.A. Br. 40.

Shortly after Ross joined the clinic, Ferns told him that Khan had ordered a prohibition on urinalysis because such tests were not profitable. Ferns suggested that Ross speak to Khan about the prohibition, but Ross did nothing. On another occasion, Ferns told Ross that he routinely prescribed drugs without seeing test results, and that when the lab results arrived he did not review them. Ross took no action in response to that information. In March 1991, after a DSS representative had taken custody of 20 of Ross's files, Ferns advised Ross that they should "put a lid on Mevacor"—a high cholesterol drug—because the clinic was routinely prescribing it for patients whose blood tests showed a normal cholesterol level. Ross agreed, and sent Ferns a letter "directing" Ferns not to prescribe Mevacor without proof of high cholesterol. Pet. App. 12a; Gov't C.A. Br. 41, 103-104. A subsequent review of the charts of patients supervised by Ross revealed patently unnecessary testing. Gov't C.A. Br. 42.

2. a. Ross testified at trial that he had no knowledge of the ongoing fraud at the Khan clinics. Gov't C.A. Br. 45-52.

The district court instructed the jury:

> In determining whether these defendants acted knowingly, you may consider whether the defendants deliberately closed their eyes to what otherwise would have been obvious.
>
> I would like to point out that the necessary knowledge cannot be established by showing that a defendant was careless, negligent or foolish. However, one may not willfully and intentionally remain ignorant of a fact material and important to his or her conduct in order to [escape] the consequences of the criminal law. If you find beyond a reasonable doubt that a defendant was aware that there was a high probability that the representations charged in the indictment were fraudulent but deliberately and consciously avoided confirming this fact, then you may treat this deliberate avoidance of positive knowledge as the equivalent of knowledge.

Gov't C.A. Br. 106.

b. Before trial, the court issued an order, pursuant to 18 U.S.C. 981(b)(1) and 1963(d)(1), restraining certain of petitioner Ross's assets, including real property, bank accounts, and investment accounts. The order permitted the release of assets for living expenses and the release of $100,000 for attorney's fees through sentencing. Following the jury's verdict of guilty as to Ross, the district court issued an order pursuant to the All Writs Act, 28 U.S.C. 1651(a), restraining Ross's assets until sentencing.

The court cited its intention at sentencing to order "substantial restitution" reflecting "all of the losses caused by [Ross's] activities" and found "a real question" as to the existence of "liquid assets" to satisfy that restitution. Gov't C.A. Br. 166-167. The court found "no logic to the position that the [c]ourt is powerless to enter a restraining order after a [guilty verdict] simply because sentencing has been delayed so that a pre-sentence report may be prepared." *Id.* at 168. The court also noted its authority under 18 U.S.C. 3663 to enter a restraining order at sentencing.[3]

At sentencing, the court found nothing to contradict the presentence report's determination that Ross had a net worth in excess of half a million dollars, and it ordered Ross to pay restitution in the amount of $612,855, to be paid according to a schedule that would be set at a subsequent proceeding. The district court invited Ross's counsel to submit a brief on the issue of whether maintaining a restraining order on his assets would constitute a denial of Ross's right to counsel. Ross's counsel declined the court's invitation. Gov't C.A. Br. 168-169.

At the subsequent hearing, the district court evaluated Ross's assets and reaffirmed its earlier

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[3] 18 U.S.C. 3663(h)(1)(B) provides that an order of restitution "may be enforced * * * by the United States * * * in the same manner as a judgment in a civil action." Federal Rule of Civil Procedure 69(a) allows the federal government to enforce civil judgments in accordance with state practice and procedure. New York Civil Practice Law and Rules § 5222 (McKinney Supp. 1995) provides for the issuance of a restraining order to prevent a judgment debtor from dissipating his assets.

order of restitution. The court ordered that the restitution payments be made according to a schedule determined by the Probation Department as a special condition of supervised release. The court also restrained Ross's assets pending appeal, again citing its authority under 18 U.S.C. 3663(h).[4] The court stated that it would "entertain an application to adjust the restraining order to the extent necessary to pay reasonable living expenses." Ross has never made such application. Pet. App. 23a; Gov't C.A. Br. 169.

3. The court of appeals affirmed petitioners' convictions, but remanded for reconsideration of the restitution orders. Pet. App. 1a-24a. Applying the standard recited in *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"), the court rejected petitioners' claim that the evidence was insufficient to establish their knowledge of the scheme to defraud Medicaid. Pet. App. 8a-10a, 12a-13a.

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[4] The government further noted, without dispute from Ross, the court's authority under Federal Rule of Criminal Procedure 38(e) to enter a restraining order pending appeal to ensure compliance with restitution. Gov't C.A. Br. 169. Rule 38(e) provides:

> A sanction imposed as part of the sentence pursuant to 18 U.S.C. * * * 3556 [order of restitution] may, if an appeal of the conviction or sentence is taken, be stayed * * *. The court may issue such orders as may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering of a restraining order * * *.

The court also rejected Williams' argument that Larita Mitchell's testimony should be disregarded because Mitchell had perjured herself at trial. The alleged perjury consisted of Mitchell's testimony that she remembered her visit with Williams because she had gone to the clinic that day to obtain money to pay her son's Boy Scout dues; according to Williams, Mitchell did not have a son in the Boy Scouts. Pet. App. 9a-10a; Gov't C.A. Br. 58 n.*. The court noted that the government had made a "painstaking investigation" into the allegations that Mitchell's testimony was perjured, and that the results were inconclusive. The court further found no evidence that the government had knowledge of any perjury when it proffered Mitchell as a witness. Finally, the court held, Mitchell's credibility was vigorously disputed before the jury. Pet. App. 10a.

The court also rejected Ross's contention that his conduct did not amount to a pattern of racketeering activity because he worked at the Khan clinics for only nine weeks. The court held that the predicate acts of racketeering had the requisite "relatedness" and "continuity" because all the predicate acts of mail fraud were performed in the same way with the same purpose, and because the clinics regularly engaged in defrauding Medicaid. Pet. App. 13a.

The court further rejected petitioners' claim that the district court's conscious avoidance charge was error because it failed to include certain "actual belief" balancing language—*i.e.*, that the jury could not infer the defendant's knowledge of a fact if the defendant actually believed that that fact did not exist. The court held that the instruction given, to which petitioners offered no objection at trial, did not amount to plain error. The court found that although

the instruction did not include the "actual belief" language preferred by that Circuit, the district court's charge as a whole set forth the requisite level of knowledge and made clear that the necessary knowledge could not be established by showing that a defendant was "careless, negligent, or foolish." Pet. App. 16a-17a.

The court remanded on the issue of restitution. The court found that the record did not indicate whether the district court, in setting the amount of restitution, considered the financial resources of the defendants or the financial needs and earning ability of the defendants and their dependents, as required by 18 U.S.C. 3664(a). Pet. App. 22a. The court also held that the district court had improperly ordered that the restitution payments be made according to a schedule determined by the Probation Department. *Id.* at 23a.

ARGUMENT

1. Petitioners argue (95-289 Pet. 33-40; 95-290 Pet. 49-56) that in reviewing the sufficiency of the evidence, the court of appeals failed to apply the standard articulated in *Jackson* v. *Virginia*, 443 U.S. 307, 316-318 (1979), and *In re Winship*, 397 U.S. 358 (1970). That claim is incorrect. In upholding the sufficiency of the evidence, the court, citing *Jackson* v. *Virginia*, 443 U.S. at 319, correctly stated that the standard of review was whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Pet. App. 8a. Applying that standard, the court found the evidence sufficient to

establish petitioners' knowing involvement in the conspiracy charged.[5]

As to petitioner Williams, the court relied upon the following factors as establishing her knowledge of the scheme to defraud Medicaid: Khan's testimony that Williams was aware of his relationship with Clin Path and that she agreed to pay him 40% of her Medicaid receipts; Williams' entry into a bogus lease agreement under which she agreed to pay Khan $1500 per week for rent; Williams' volunteering to take over as the "front" when Khan told her that he was going to close the clinics; Williams' misleading of Dr. Sadaphal upon hearing Sadaphal's concerns regarding the similar diagnoses on all the patient charts; and Mitchell's testimony that Williams gave her a prescription without performing a medical exam. Pet. App. 8a-9a. That evidence was sufficient to establish Williams' knowledge of the illegal scheme beyond a reasonable doubt.

As to petitioner Ross, the court relied on the expert testimony establishing the fraudulent nature of Ross's patients' charts; Ross's presence three days

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[5] Petitioners also claim (95-289 Pet. 38-39; 95-290 Pet. 55-56) that reliance on this language in *Jackson* v. *Virginia* undercuts the "beyond a reasonable doubt" standard by suggesting that only one juror need be persuaded of a defendant's guilt beyond a reasonable doubt. In reciting that the standard was whether "*any* rational trier of fact" could have found guilt beyond a reasonable doubt, however, the *Jackson* Court was merely making the observation that the sufficiency inquiry does not require an appellate court to "ask itself whether *it* believes that the evidence at the trial established guilty beyond a reasonable doubt." 443 U.S. at 318-319. Rather, explained the Court, the relevant question is whether "*any* rational trier of fact" could have so found. *Id.* at 319.

a week at the clinic, where he had ample opportunity to observe the "utterly inadequate facilities" as well as the posted signs indicating that only new patients were welcome; Ross's attempt to cover his tracks, after the DSS had taken custody of some of his patients' files, by instructing that a certain drug be prescribed only when the condition for which it should be prescribed was present; and Ross's failure to do anything upon being informed that all of his patients came in with the same complaints, and upon being asked to speak to Khan about a nonsensical prohibition on urinalysis. Pet. App. 12a-13a. As the court of appeals correctly found, that evidence was sufficient to establish Ross's knowledge of the clinics' fraudulent nature. *Ibid.*

Petitioners rely (95-289 Pet. 34-38; 95-290 Pet. 51-55) on an article authored by Second Circuit Chief Judge Jon Newman, to the effect that appellate courts have failed to take the "beyond a reasonable doubt" standard seriously in assessing sufficiency of the evidence claims. Whether other courts have properly applied the correct standard of review to sufficiency claims, however, has no bearing on this case; the factors relied upon by the court of appeals in this case clearly established petitioners' guilt beyond a reasonable doubt.

2. Petitioner Williams argues (95-289 Pet. 13-16, 40-50) that, in conducting its sufficiency analysis, the court of appeals improperly relied on Larita Mitchell's testimony because evidence discovered after trial showed that Mitchell had perjured herself. In particular, petitioner claims that Mitchell lied in testifying that she remembered her visit to the clinic and her treatment by Williams because she had gone to the clinic that day to obtain money to pay her son's

Boy Scout dues. According to Williams, evidence discovered after trial (which petitioner fails to disclose here) showed that Mitchell's seven-year-old son was not old enough to be a Boy Scout and that in any event the child was not in Williams' custody at the time of Mitchell's visit to the clinic.

Petitioner cannot complain of the court of appeals' consideration of Mitchell's testimony in assessing the sufficiency of the evidence against her. Following the post-trial discovery of the alleged perjury, petitioner made no attempt to seek a new trial or to present evidence of the alleged perjury to the district court. Moreover, the court of appeals found that the government had conducted a "painstaking investigation" into the allegations, but that the results were "inconclusive." Pet. App. 10a. The court further found that petitioner had presented no evidence that the government had knowledge of any perjury when it proffered Mitchell as a witness. *Ibid.*

In any event, Mitchell's alleged perjury went to a collateral issue, and not to the core of her testimony that she visited the clinic and that Williams issued her a prescription without first conducting an examination of any kind. Indeed, Mitchell's meeting with Williams was fully corroborated by the patient file prepared by Williams and introduced into evidence at trial. Gov't C.A. Br. 58 n.*. Moreover, Mitchell's credibility was thoroughly challenged on cross-examination. That examination disclosed Mitchell's drug addiction, her prior conviction for drug possession, and her possible fear of prosecution. Evidence bearing on whether or not her son was a Boy Scout at the time in question would have added little

of impeachment value to the cross-examination.[6] Finally, even absent Mitchell's testimony, the evidence amply established the existence of the fraudulent scheme and Williams' knowing participation in that scheme. The court of appeals' reliance on Mitchell's testimony in assessing the sufficiency of the evidence would, at most, be harmless error.

3. Petitioner Ross argues (95-290 Pet. 56-59) that the evidence failed to establish that his conduct amounted to a "pattern of racketeering activity" be-

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[6] Petitioner relies (95-289 Pet. 40-41) on *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115 (1956), for the proposition that the court of appeals improperly relied on Mitchell's testimony in making its assessment as to the sufficiency of the evidence. Petitioner's reliance on *Communist Party* is misplaced. In *Communist Party*, this Court, having granted certiorari, was faced with an "uncontested challenge" that one of the administrative findings under review "was in part the product of three perjurious witnesses." *Id.* at 124. To avoid unnecessary decision of the constitutional issues on which certiorari was granted, see *id.* at 122, the Court remanded the case to the agency for a determination of whether the agency had based its decision on tainted or untainted evidence. That disposition does not suggest that a remand to the court of appeals or district court would be appropriate here. Unlike in *Communist Party*, the charge of perjury here was not "uncontested." *Id.* at 124. In addition, while the alleged perjury here was collateral, the perjury in *Communist Party* was "not inconsequential in relation to the issues on which the [agency] had to pass." *Id.* at 123. Unlike petitioner, who did not present her claim of perjury to the district court, the petitioner in *Communist Party* had unsuccessfully sought leave to adduce additional evidence before the Board to support its claim of perjury. *Id.* at 119-120. Accordingly, *Communist Party* does not support petitioner's claim.

cause he was at the Khan clinics for only nine weeks. The court of appeals correctly rejected that claim.

In *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989), the Court held that, to form a pattern, the predicate acts of racketeering in a RICO case must be "related" and must "amount to or pose a threat of continued criminal activity." Criminal acts are related if they have the "same or similar purposes, results, participants, victims, or methods of commission." *Id.* at 240. The Court defined "continuity" to include "either * * * a closed period of repeated conduct, or * * * past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. When a RICO case has been commenced before continuity can be established by proof of "a series of related predicates extending over a substantial period of time," then "liability depends on whether the *threat* of continuity is demonstrated." *Id.* at 242.

Although the Court in *H.J. Inc.* stated that continuity is "centrally a temporal concept," it also made clear that "the requisite threat of continuity" may be present even though "the number of related predicates involved may be small and they may occur close together in time." 492 U.S. at 242. The Court explained that a "RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit," or if "the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future." *Ibid.* Finally, the Court held that facts external to the predicate acts, such as the nature of the RICO enterprise, may supply the threat of continued criminal activity. For example, the threat of continuity may be established

by showing that the predicate acts are part of an ongoing entity's regular way of doing business. *Id.* at 243. The question whether the charged predicate acts establish a threat of continued racketeering activity "depends on the specific facts of each case." *Id.* at 242.

As the court of appeals correctly held (Pet. App. 13a), the *H.J. Inc.* standards are met here. Ross's ten predicate acts of mail fraud were performed in the same way and with the same purpose: to defraud Medicaid. Moreover, the requisite threat of continuity was present here because the Khan clinics regularly engaged in defrauding Medicaid—indeed, the perpetration of such fraud appears to have been the sole reason for the clinics' existence.

Petitioner mistakenly asserts (95-290 Pet. 57-58) that the court of appeals' conclusion that his conduct amounted to a pattern of racketeering conflicts with the Court's decision in *Reves* v. *Ernest & Young*, 113 S. Ct. 1163 (1993). In *Reves*, this Court construed the phrase "to conduct or participate, directly or indirectly, in the conduct of [an] enterprise's affairs" to require an element of managing or operating the enterprise. The Court explained (*id.* at 1170) (footnote omitted):

> Of course, the word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" makes clear that RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise's affairs is required.

Here, the proof squarely established that petitioner had a role in directing the clinics' affairs. Like the

other physicians employed by the clinic, Ross performed unnecessary tests on patients, billed Medicaid for the office visits and the medical tests, and kicked back 40% of his Medicaid receipts to Khan. Moreover, a physician such as Ross may reasonably be found to be a supervisor of the Physicians Assistants, whose activities were the primary means of carrying out the fraudulent schemes. Thus, petitioner had a role in directing or managing the illegal scheme, which established his "participat[ion] in the operation or management of the enterprise itself." *Id.* at 1172.[7]

4. Petitioners also contend (95-289 Pet. 17-33; 95-290 Pet. 34-49) that the district court erred in giving the jury a "deliberate ignorance" instruction on the knowledge element of the offense. They argue (95-289 Pet. 18-19, 25-26; 95-290 Pet. 34-35, 42-43) that the

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[7] Ross also raises a vagueness challenge to the pattern of racketeering element of the RICO statute. He relies on the opinion concurring in the judgment in *H.J. Inc.*, 492 U.S. at 251-256, in which Justice Scalia, joined by three other Justices, expressed doubts about whether the RICO "pattern" requirement could withstand a constitutional vagueness challenge. To succeed on such a vagueness claim, the defendant must show that the statute is vague as applied to the particular conduct with which he is charged. See *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 & n.7 (1982); *United States* v. *Powell*, 423 U.S. 87, 92 (1975). The defendant must show that the statute fails to give a person of ordinary intelligence reasonable notice that his conduct is forbidden. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). Petitioner's active participation in this case of ongoing Medicaid fraud unmistakably satisfied the pattern requirement On ten separate occasions over a two-month period, Ross submitted invoices to Medicaid for patently unnecessary tests. Those acts, as Ross well knew, were part of the clinics' regular way of doing business.

instruction was improper because it permitted the jury to convict them on proof of mere negligence; that the instruction was legally insufficient because it did not contain certain balancing language; and that there was no evidentiary basis for such a charge.

This Court has denied several recent petitions for writs of certiorari raising similar issues. See *Palomino-Figueroa* v. *United States*, 115 S. Ct. 640 (1994); *Caterino* v. *United States*, 113 S. Ct. 129 (1992); *Marquez* v. *United States*, 504 U.S. 975 (1992); *Salgado-Aristizabel* v. *United States*, 504 U.S. 942 (1992); *Tomala* v. *United States*, 504 U.S. 932 (1992). The government acquiesced in the petition for certiorari in *Tomala*, and the government also suggested that the petitions in *Salgado-Aristizabel* and *Marquez* be held pending this Court's disposition of *Tomala*. The petitions in all of those cases were nonetheless denied. There is no reason for a different result here.

a. The instruction given in this case did not dilute the knowledge requirement of petitioners' offenses or otherwise permit their conviction on proof of mere negligence. The second paragraph of the district court's instruction concerning the knowledge element of the offenses largely tracked Model Penal Code § 2.02(7), which states:

> When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

That definition of knowledge was approved by this Court in *Leary* v. *United States*, 395 U.S. 6, 46 & n.93 (1969), and *Turner* v. *United States*, 396 U.S. 398, 416

& n.29 (1970). The Model Penal Code definition of knowledge is commonly used in so-called "deliberate ignorance" or "conscious avoidance" cases, in which the defendant asserts that he lacked knowledge of a crucial material fact. In fact, however, the instruction is more accurately described as a definition of the level of certainty required to constitute knowledge of a fact for purposes of the criminal law. Congress could not have viewed the absence of absolute certainty as equivalent to the absence of knowledge, for in many cases a defendant would learn of incriminating facts only from other persons, rather than from direct observation, or would avoid learning the facts in order to maintain a pretense of ignorance. The "high probability" formulation accords with the common sense understanding of the level of certainty required to constitute knowledge in those situations.

Contrary to petitioners' contention (95-289 Pet. 18-19, 25-26; 95-290 Pet. 34-35, 42-43), the instruction in this case did not invite the jury to convict them on a theory of negligence. The instruction stated that the jury could find that petitioners acted knowingly if it found beyond a reasonable doubt that they were "aware that there was a high probability that the representations charged in the indictment were fraudulent but deliberately and consciously avoided confirming this fact." Gov't C.A. Br. 106. The instruction expressly cautioned, however, that the necessary knowledge could not be established by showing that petitioners were "careless, negligent or foolish." *Ibid.*

Petitioners argue (95-289 Pet. 27-29; 95-290 Pet. 44-45) that the conscious avoidance instruction was insufficient as a matter of law because it failed to include any "actual belief" balancing language—*i.e.*,

that a defendant's knowledge was not established by an awareness of a high probability of a fact's existence if he actually believed that the fact did not exist. Petitioners correctly note that in *United States* v. *Feroz*, 848 F.2d 359, 360-361 (2d Cir. 1988) (per curiam), the Second Circuit stated that "in giving the conscious avoidance charge, the district judge should instruct the jury that knowledge of the existence of a particular fact is established (1) if a person is aware of a high probability of its existence, (2) unless he actually believes that it does not exist." The court directed that the prosecutor should request that the "high probability" and "actual belief" language be incorporated into every conscious avoidance charge. The court nonetheless held that a conscious avoidance instruction that included neither "actual belief" nor "high probability" balancing language, while "incomplete," did not constitute plain error.

In keeping with the court's directive in *Feroz*, the government in this case requested that the "actual belief" language be included in the charge. The district court failed to comply with that request, however, and petitioners did not object to the omission. Gov't C.A. Br. 111 n.* The court did, however, instruct that "the necessary knowledge cannot be established by showing that a defendant was careless, negligent or foolish." *Id.* at 106. Moreover, during deliberations, in response to a jury request for further instructions concerning the agreement necessary to establish a conspiracy, the district court charged the jury (*id.* at 108 (emphasis omitted)):

> If you find that a doctor who you are considering went to work at one of these clinics

> and that that doctor's activities furthered the fraudulent scheme but that doctor did not know that a fraud was going on, the mere fact that that doctor worked at that clinic without knowledge or intent to further the fraudulent activity, that would not make that doctor a member of the conspiracy, because the doctor would not knowingly and intentionally in any way associate himself or herself with the fraud, and therefore there would never be a basis on which you could find that, impliedly or tacitly, that doctor agreed to participate in a fraudulent scheme or fraudulent conspiracy.
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> * * * * *
>
> * * * It is * * * absolutely required that you find before you convict a defendant that that defendant knowingly and intentionally acted to further the aims of the conspiracy. The fact that a person simply worked there, if that person did not know of any fraud going on and did not intend to further any fraud by their action, that would not justify any verdict of guilty in this case.

Given these explicit instructions as to the level of knowledge necessary to convict, the court of appeals properly found (Pet. App. 17a) that the district court's failure to include the "actual belief" language in the conscious avoidance instruction "did not constitute plain error 'going to the very essence of the case.'"

b. Petitioners also argue (95-289 Pet. 19-20, 30-31; 95-290 Pet. 36-37, 46-48) that the deliberate ignorance instruction was improperly given in this case because the evidence at trial did not present a question of conscious avoidance. The evidence, however, was

sufficient to establish that if petitioners were unaware of the Medicaid fraud, their ignorance was deliberate. Petitioners ignored the obvious physical inadequacies of the Khan clinics, they failed to question the blatant and repetitive similarities in the patient charts, they authorized expensive tests and prescriptions that were unsupported by the patient files, and they received large Medicaid payments in exchange for doing virtually nothing. When a physician voiced concern to petitioner Williams that "something was wrong" because all the patient charts were nearly identical, Williams took no steps to assure herself of the legitimacy of the clinic's practice, but summarily dismissed the physician's concern by responding that the suspicious similarities were representative of the community in which the clinics were located. Similarly, when PA Ferns told petitioner Ross that all of the patients complained about essentially the same ailments, and directed that Ross would write them prescriptions, Ross "swallowed" and said nothing. When Ferns told Ross that he should talk to Khan about Khan's prohibition on urinalysis because they were not profitable, Ross did nothing. And when Ferns told Ross that he routinely prescribed drugs without seeing test results, and that when the lab results arrived he did not review them, Ross did nothing. In sum, the evidence was more than adequate to justify a conscious avoidance charge.[8]

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[8] Petitioners claim (95-289 Pet. 30-31 & n.8; 95-290 Pet. 47-48 & n.16) that unlike the Fifth, Ninth, Tenth, and Eleventh Circuits, which require an evidentiary showing that the defendant pursued a conscious course of deliberate ignorance, the Second Circuit "allows use of a conscious avoidance charge

5. Finally, petitioner Ross contends (95-290 Pet. 59-64) that, following his conviction, the district court improperly restrained his assets pursuant to the All Writs Act, 28 U.S.C. 1651, in order to preserve those assets for restitution at sentencing. That contention is moot. The district court's order restraining Ross's assets pending sentencing, issued pursuant to the All Writs Act, was in effect only for the brief period of time between its entry and the district court's restitution order at sentencing. By its terms, the order expired at sentencing; accordingly, there is no reviewable issue for the Court to consider. See *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990); *Deakins* v. *Monaghan*, 484 U.S. 193, 199 (1988).[9]

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without specific evidence of a conscious purpose to avoid detection." Petitioners are wrong. Although the courts of appeals have articulated a variety of approaches to the question of when an instruction concerning deliberate ignorance may be given, the Second Circuit has held that there must be an evidentiary basis for a conscious avoidance charge. Thus, the court has held that a factual predicate exists for the charge when "the evidence is such that a rational juror may [conclude] beyond a reasonable doubt" that "the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." *United States* v. *Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993); see also *United States* v. *Mang Sun Wong*, 884 F.2d 1537, 1541-1542 & n.5 (2d Cir. 1989), cert. denied, 493 U.S. 1082 (1990). The Second Circuit in this case did not address petitioners' claim that there was no evidentiary basis for a conscious avoidance instruction. There was ample evidence, however, to show that petitioners consciously avoided confirming the Medicaid fraud that was taking place at the Khan clinics.

[9] The district court clearly had the authority at sentencing, pursuant to Federal Rule of Criminal Procedure 38(e), to restrain petitioner Ross's assets pending appeal in

In any event, the district court properly restrained Ross's assets following his conviction and pending sentencing pursuant to the All Writs Act. That Act provides that a court "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. 1651(a). This Court "has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States* v. *New York Telephone Co.*, 434 U.S. 159, 172 (1977) (approving use of All Writs Act to order telephone company to assist FBI in installing pen registers, even though no statute specifically required such assistance).

Here, based on the evidence presented at trial, the district court was persuaded that Ross should make restitution to the State of New York for the losses caused by his activities, including both the amounts he himself received and the amount paid by the State for unnecessary tests ordered under Ross's provider number. An order restraining Ross's assets was therefore necessary in order to preserve Ross's assets pending sentencing. Because the order was "necessary and appropriate in aid" of the district court's jurisdiction, it was entirely appropriate under the All Writs Act.

Ross also claims (95-290 Pet. 62-63) that the post-verdict restraining order violated his Sixth Amend-

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order to ensure compliance with the court's restitution order, and petitioner Ross does not dispute the district court's authority to do so.

ment right to use his own funds to retain defense counsel. It is doubtful that funds needed to satisfy restitution orders have any different constitutional status from forfeitable funds, see *United States* v. *Monsanto*, 491 U.S. 600, 615-616 (1989) (rejecting Sixth Amendment attack on restraint of forfeitable funds), but, in any event, petitioner's claim lacks merit. Under the pre-trial restraining order, $100,000 was made available to Ross to hire and pay for counsel of his choice. Moreover, the district court determined at sentencing that Ross had a net worth in excess of half a million dollars. The court nonetheless invited Ross's counsel to submit a brief on the issue of whether maintaining a restraining order on his assets would constitute a denial of Ross's right to counsel. Ross's counsel declined that invitation. In those circumstances, Ross's Sixth Amendment claim must fail.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1995